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ONG KWEE LEE v. ABLE PERFECT SDN BHD

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-2083-11-2022]
14 JANUARY 2025

Abstract – *(i) A valid private express trust is established when 'three certainties' are clearly present within a trust deed, and the beneficial ownership under such a trust is distinct from the conditions required for the transfer of legal ownership. The three certainties are: (a) certainty of intention – there must be a clear language indicating a trust; (b) certainty of subject matter – there must be a clearly defined property; and (c) certainty of objects – there must be identifiable beneficiaries; (ii) A trustee has a fiduciary duty to act solely in the beneficiary's best interests and this includes ensuring that any dealings with trust property, such as dividends in this case, are beneficial to the beneficiary; (iii) A party can simultaneously act as a trustee and a creditor within a trust deed. This allows them to uphold their fiduciary duties while also enforcing their rights as a creditor.*

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TRUSTS: *Creation of trusts – Private express trust – Fundamental elements of private express trust – Business partners agreed to jointly acquire shares – Lack of funds for acquisition of shares – Company became acquisition vehicle to pay remainder of purchase price and acquisition costs – Shares acquisition completed and beneficiary and company entered into trust deed in relation to payment of shares – Whether beneficiary entitled to dividends under trust – Whether company to hold shares until full payment – Whether dividends could only be paid to beneficiary upon full payment and transfer*

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TRUSTS: *Creation of trusts – Business partners agreed to jointly acquire shares – Lack of funds for acquisition of shares – Company became acquisition vehicle to pay remainder of purchase price and acquisition costs – Shares acquisition completed and beneficiary and company entered into trust deed in relation to payment of shares – Nature and type of trust entered into – Whether private express trust – Whether certainties to create private express trust present – Whether implied trust*

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The appellant and one Ng Keng Hoe ('Ng') were friends and business partners. In 2016, they agreed to jointly acquire 500,000 shares of Sekoplas Industries Sdn Bhd and each would be entitled to 250,000 shares. The purchase price for the 500,000 shares was RM18.75 million. As the appellant could not come up with his portion of 50% of the purchase price

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of the 500,000 shares, they decided to use the respondent as the vehicle to acquire all the 500,000 shares. The appellant contributed cash in the amount of RM500,000 while the respondent contributed the entire balance purchase price, including other costs incidental to the acquisition of the 500,000 shares. The respondent took out a term loan to finance the purchase of the 500,000 shares from a local bank. The appellant and the respondent, through Ng, agreed that the 500,000 shares would be used as security, by way of charge, for the term loan. After the acquisition of the 500,000 shares, the appellant and the respondent entered into a trust deed in regard to the mode of payment towards the acquisition of the shares. Disputes, which later arose, culminated in a claim by the respondent against the appellant, and a counterclaim by the latter against the former, at the High Court. The High Court Judge ('HCJ') held that: (i) the appellant could not benefit from half of the dividends of the 500,000 shares because the appellant had yet to acquire the right of the said 250,000 shares since he had not paid in full the 50% of the acquisition costs of the 500,000 shares. As such, the respondent could not be holding on trust the said charges for the benefit of the appellant; and (ii) there was no trust created over the 250,000 shares for the benefit of the appellant. It was merely a promise made by the appellant to the respondent that the appellant would pay the respondent in the future for the said shares and the respondent was to reserve the 250,000 shares for the appellant until the appellant paid in full his portion of the acquisition costs for the said shares, only then the respondent would transfer the said shares to the appellant. Upon the transfer, only then the respondent would be entitled to enjoy and benefit from the dividends from the said shares. Hence, the present appeal.

Held (allowing appeal)
Per Choo Kah Sing JCA delivering the judgment of the court:

(1) To create a private express trust, three certainties must be present, namely, certainties of intention, subject matter and objects, *ie*, the beneficiaries. Based on the plain language and wording of the trust deed, there was no vagueness or ambiguity that the three certainties were conspicuously present. Certainty of intention of the parties could be found from the plain language expressed in the recital, in para. (C), where it stated that the 250,000 shares beneficially belonged to the appellant and the respondent was to hold the said shares and 'all the rights, titles and benefits thereto on trust' for the appellant. Another part of the trust deed that expressed a trust was found in para. 1. With regard to certainties of subject matter and object, it was crystal-clear that the subject matter of the trust was the 250,000 shares and the object, *viz* the beneficiary, was the appellant. Hence, the fundamental elements of creating private express trust were clearly present and easily identifiable in the deed. (paras 13-16)

(2) The HCJ failed to discuss and identify the fundamental elements of a private express trust in Her Ladyship's grounds. The HCJ made an error of applying the principle of law of an implied trust and in holding that 'a party can only be said to be a beneficial owner if he has made full settlement of the purchase price'. Although ownership would be transferred to the appellant upon full settlement of the agreed acquisition costs, it was not the intention of the parties from the outset that the respondent was to sell the said shares to the appellant. Instead, it was agreed that the respondent would acquire the 500,000 shares and would hold 250,000 shares out of the 500,000 shares on behalf of and on trust for the appellant. Therefore, the assumption of beneficial ownership of the said shares was immediate and not upon condition that the appellant paid in full his part of the acquisition costs. This was a private express trust created by expressed intention and in writing, as opposed to an implied trust created by inference drawn from the facts between parties in an agreement, like a sale and purchase agreement. (paras 17, 18, 20 & 21)

(3) The appellant had to pay his part of the shares acquisition costs to the respondent and that was the condition set down in the trust in order for the trust property to be transferred to the appellant. As the HCJ applied the wrong principle of law on implied trust to a private express trust, this led Her Ladyship to the conclusion that there could be no trust until the appellant had paid up his share of the acquisition costs. For that reason, the HCJ erred in conflating the condition set out in the trust deed for the transfer of the trust property with the law for the creation of an implied trust. There were entirely distinct features. A trust could be created over a deferred right. The deferred right was in reference to the legal ownership of the said shares. The trust ought to have taken effect immediately upon the declaration being made by the respondent because the wording of the trust deed stated 'the trustee hereby irrevocably declares and confirms that as from the date the trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares'. Further, in para. (4) of the trust deed, the appellant was entitled to nominate a representative to be appointed as a director to represent his interest in the company. Thus, the appellant's right(s) as a beneficiary to the said shares took effect immediately upon the execution of the trust deed. Equally, the appellant was responsible to indemnify and keep the respondent fully indemnified against all damages, claims, costs and expenses in connection with the intended shareholders agreement to executed by the respondent who would be representing the 500,000 shares of the company. Clearly, para. (4) had set out the appellant's right and liability towards his said shares upon the execution of the trust deed. The respondent not only agreed to hold the said shares on trust but also agreed to hold the said shares and continue to hold the said shares 'with all rights, title and benefits thereto as trustee not for its own benefits,

upon trust for the sole and absolute benefit of the beneficiary'. Therefore, the respondent not only held the said shares on trust for the appellant but also held the declared dividends to the company's shares on trust for the benefit of the appellant the moment the private express trust took effect. (paras 22-27)

(4) The trust deed was silent as to whether and how the respondent may deal with the dividends received from the company's 500,000 shares. The only part in the trust deed that had some relevance to the dealing of the dividends was where it stated 'all rights, title and benefits thereto as trustee, not for its own benefits, but upon trust for the sole and absolute benefit' of the appellant. Therefore, the respondent had the onus to ensure any dealing with the dividends had to be for the sole and absolute benefit of the appellant. Insofar as the first interim dividends received, the respondent had used it to offset part of the shares acquisition costs of the appellant's portion. Therefore, the dealing of the first interim dividends was indeed for the sole and absolute benefit of the appellant. (paras 28-30)

(5) The respondent was wearing two hats at the same time in the trust deed, one as a trustee and the other as a creditor. Insofar as the obligation as a trustee was concerned, the respondent was responsible to ensure the dealings of the trust property and the rights, title and benefits thereto would go to the absolute benefit of the appellant. With regard to the position as a creditor, the respondent had the right to demand from the appellant for the repayment of the balance outstanding acquisition costs, as envisaged in para. (2) of the trust deed. The parties in the trust deed agreed that the respondent could demand that the appellant pay his portion of the liabilities towards payment of the acquisition costs and financing obligations associated with the trust property, *ie*, the said shares. Therefore, the respondent was entitled to do so at anytime despite the finding that the dividends could be used to offset the appellant's portion of the acquisition costs. There was no agreement that the repayment of the appellant's portion of the acquisition costs could be deferred to as and when dividends were received from time to time. However, that right to demand had become academic. (paras 34 & 44)

Case(s) referred to:

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

For the appellant - Cyrus Das, Lau Kee Sern & Leong Xin Wen; M/s Kee Sern, Siu & Huey

For the respondent - Harjinder Singh Saudagar Singh, Leong Yeng Kong & Chia Zong You; M/s Leong Yeng Kit & Co

[Editor's note: For the High Court judgment, please see Able Perfect Sdn Bhd v. Ong Kwee Lee [2023] CLJU 2984; [2023] 1 LNS 2984 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Choo Kah Sing JCA:

Introduction

[1] The bone of contention in this appeal is whether the appellant was a
B beneficiary of 250,000 shares of a company known as Sekoplas Industries Sdn Bhd (hereafter "the said shares"), and whether the appellant was in breach of a trust deed dated 11 April 2016 (hereafter "the trust deed") in regard to the mode of payment towards the acquisition of the said shares which were registered in the name of the respondent, and whether the
C appellant was entitled to enjoy the benefit of the dividends to the said shares immediately despite not having paid the full amount of his portion of the shared acquisition costs to the respondent.

[2] The respondent contended that it was entitled under the trust deed to demand from the appellant the shared acquisition costs for the said shares
D together with interest, whereas the appellant in his counterclaim contended that his payment for the shared acquisition costs was by way of offsetting his entitlement to the dividends declared from the said shares, and that the dividends received would be used to offset the amount owing to the respondent for the acquisition of the said shares. In essence, the appellant's
E counterclaim sought for immediate benefit and entitlement of the dividends accrued from time to time despite the appellant not having paid in full his part of the shared acquisition costs (including the purchase price) of the said shares.

[3] The High Court found in favour of the respondent, and did not accept
F that the parties had created a trust for the said shares in that the respondent was holding on trust the said shares for the benefit of the appellant. Consequently, the High Court dismissed the appellant's counterclaim. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal.

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Brief Facts

[4] The appellant, Ong Kwee Lee, and one Ng Keng Hoe were friends and business partners. In early 2016, they agreed to jointly acquire 500,000 shares of the company Sekoplas Industries Sdn Bhd, and each would be
H entitled to 250,000 shares. The purchase price for the 500,000 shares was RM18,750,000. The appellant could not come up with his portion (50%) of the purchase price of the 500,000 shares. They then decided to use the respondent company as the vehicle to acquire all the 500,000 shares.

[5] The appellant contributed cash RM500,000 and the respondent
I contributed the entire balance purchase price, including other costs incidental to the acquisition of the 500,000 shares. The respondent took out

a term loan to finance the purchase of the 500,000 shares from a local bank. The appellant and the respondent (through Ng Keng Hoe) agreed that the 500,000 shares would be used as security (by way of a charge) for the term loan.

[6] In addition to the shares being the security for the loan, the respondent also provided a third party charge of a property which belonged to Ng Keng Hoe's wife, and further provided a personal joint and several guarantees executed by Ng Keng Hoe and the wife in favour of the local bank. The loan was a term loan over a repayment period of seven years by way of monthly instalments. The acquisition of the 500,000 shares was completed on 11 April 2016. On the same day, 11 April 2016, the appellant and the respondent entered into the trust deed. The salient terms of the trust deed read as follows:

> Whereas:
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> A. The Trustee [the respondent] is presently the registered owner of 500,000 ordinary shares of RM1 each, representing 50% of the issued and paid-up share capital ("Total Shares") of Sekoplas Industries Sdn Bhd (Company No. 92720-W), a private limited company incorporated in Malaysia and having its registered address at Suit 1603, 16th Floor, Wisma Lim Foo Yong, No. 86, Jalan Raja Chulan, 50200 Kuala Lumpur ("Company").
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> B. The Total Shares were acquired at a price of RM18,750,000 *via* the Share Acquisition Agreement dated 28 January 2016, and partly financed by a loan granted to the Trustee by Hong Leong Bank Berhad of RM15 million.
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> C. The Trustee hereby acknowledges and confirms that the Total Shares were acquired jointly with the Beneficiary [the appellant] in equal share, and therefore half portion of the Total Shares comprising 250,000 ordinary shares of RM1 each representing 25% of the issued and paid-up share capital of the Company ("trust shares") beneficially belong to the Beneficiary, and the Trustee shall hold the trust shares and all the rights, title and benefits thereto on trust for the Beneficiary.
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> Now This Deed Witnesses As Follows:
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> 1. The Trustee hereby irrevocably declares and confirms that as from the date the Trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares with all rights, title and benefits thereto as Trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the Beneficiary. Notwithstanding the aforesaid, the Beneficiary hereby acknowledges and agrees that the trust shares are charged to Hong Leong Bank Berhad as security for the financing obtained.

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2. The Beneficiary hereby covenants and undertakes to bear the acquisition price and all ancillary costs thereof (including financing costs) in equal share with the Trustee, and hereby irrevocably undertakes to indemnify and keep the Trustee fully indemnified against all damages, claims, costs and expenses in connection with the trust shares. The Beneficiary shall upon a request or demand being made by the Trustee, promptly and immediately contribute his portion of liabilities towards payment of the acquisition costs and financing obligations associated with the trust shares.

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3. The Trustee shall cause the trust shares to be transferred to the Beneficiary and/or his nominee as and when requested to do so by the Beneficiary, subject to full settlement of all liabilities attributable to the trust shares by the Beneficiary.

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4. The parties hereto mutually agree that the Trustee shall enter into a Shareholders Agreement with the other shareholder(s) of the Company in connection with the Total Shares, and both the Trustee and the Beneficiary shall each nominate a representative to be appointed as director of the Company to represent the respective interest of the parties hereto, and the Trustee shall exercise all the rights under the Shareholders Agreement in consultation of the Beneficiary. Whereas in relation to the trust shares, the Beneficiary irrevocably undertakes to indemnify and keep the Trustee fully indemnified against all damages, claims, cost and expenses in connection with the Shareholders Agreement.

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5. Save as stated herein, the Trustee shall not at any time prior to the transfer in accordance to Clause 2 above, sell transfer dispose of charge mortgage pledge lease let assign transfer dispose off or mortgage the trust shares without the Beneficiary's prior written consent and shall deal with the same only in such manner as directed by the Beneficiary.

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The Findings Of The High Court

[7] In essence, the finding of the learned High Court Judge is encapsulated in para. 71 of Her Ladyship's judgment, which reads as follows:

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71. Quite pertinently, the defendant [appellant] himself admitted that these shares were not gifts from the Plaintiff [respondent]. In fact, the trust deed quite clearly laid down what the Defendant was required to do in order to gain ownership of the 250,000 Sekoplas Shares. In my considered view Clauses 2 and 3 provide clear duties and obligations on the part of both parties. Both Clauses when read together bear the meaning that the shares must be paid for before the Defendant has any sort of right to it. The Defendant has not shown evidence of actual payment save for the initial payment of RM500,000 in January 2016. As

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such the trust deed could only be viewed as acknowledging and affirming the Defendant's interest in the 250,000 Sekoplas Shares subject always to the full payment of the Acquisition Cost. Such an interest cannot be equated or elevated to the status of an immediate beneficial ownership status. There is no evidence that parties had intended to declare a trust.

[8] In para. 74, Her Ladyship further stated as follows:

74 .... In order to be considered a beneficial owner the Defendant must be able to prove that he had performed his contractual obligation upon full settlement of the purchase price before there the Plaintiff can be said to be holding the shares as a trustee for him.

[9] In para. 78, Her Ladyship has also stated as follows:

78. The Defendant has the onus of proving that he is the beneficial owner and the Plaintiff the alleged trustee. In my considered opinion the Defendant has not met the threshold of having made full settlement of the purchase price. Here it was the Plaintiff alone who had entered into the Share Sale Agreement with the previous vendors on 28.1.2016. The Defendant was not a party to the Share Sale Agreement. All he had to show was his promise to pay the Acquisition Cost in equal share in the future. I am in complete agreement with the Plaintiff that a mere promise to pay later does not amount to immediate beneficial ownership in those shares. At best the Defendant is a promisee of the shares reserved for him subject to his actual payment of the locked in price as promised by the Plaintiff.

[10] In summary, the learned High Court Judge opined, among others, that the appellant could not benefit from half of the dividends of the 500,000 shares because the appellant had yet to acquire the right of the said shares (250,000 shares) since he had not paid in full the 50% of the acquisition costs of the 500,000 shares. As such, the respondent could not be holding on trust the said shares for the benefit of the appellant.

[11] Consequently, the learned High Court Judge did not accept that the parties had agreed to the mode of payment of the appellant's said shares by way of offsetting the purchase price with the declared dividends.

[12] In conclusion, the learned High Court Judge found there was no trust created over the 250,000 shares for the benefit of the appellant. At best, it was merely a promise made by the appellant to the respondent that the appellant will pay the respondent in the future for the said shares, and that the respondent was to reserve the 250,000 shares for the appellant until the appellant paid in full his portion of the acquisition costs for the said shares, only then the respondent would transfer the said shares to the appellant. Upon the transfer, only then the appellant would be entitled to enjoy and benefit from the dividends from the said shares.

A **The Findings Of This Court**

Private Express Trust

[13] It is trite law that to create a private express trust three certainties must be present, namely, certainty of intention, certainty of subject matter and
B certainty of object(s), *ie*, the beneficiary(ies). How the trustee is to manage, control and/or deal with the trust property entirely depends on the terms as provided in the deed. The trustee's duties, responsibilities and powers are governed by the Trustee Act 1949 (Revised 1978) [Act 208] and the common law.

C **[14]** In the present case, reading from the plain language and wording of the trust deed, there is no vagueness or ambiguity that the three certainties are conspicuously present. Certainty of intention of the parties could be found from the plain language expressed at the recital in para. (C), wherein it stated that the 250,000 shares beneficially belonged to the appellant, and that the
D respondent was to hold the said shares and "all the rights, title and benefits thereto on trust" for the appellant. Another part of the trust deed that expresses the parties' certainty of intention to create a trust is found in para. 1 which is reproduced as below:

> 1. The Trustee hereby irrevocably declares and confirms that as from the
E date the Trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares with all rights, title and benefits thereto as Trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the Beneficiary ...

[15] There could be no better way to express the parties' intention to create
F a trust from the above wordings. The words used are unequivocal, explicit and unreserved.

[16] With regard to the certainty of subject matter and certainty of object, the above paragraph is crystal clear that the subject matter of the trust was the 250,000 shares and the object, *viz* the beneficiary, was the appellant.
G Hence, the fundamental elements of creating a private express trust are clearly present and easily identifiable in the deed.

High Court Applied The Legal Principle Of An Implied Trust

[17] This court finds the learned High Court Judge failed to discuss and
H identify the fundamental elements of a private express trust in her grounds. Beneficial ownership in a private express trust could be created and take immediate effect upon a clear declaration expressed in writing, and provided that the three certainties are found to be present in the deed. In para. 1 of the trust deed, the respondent had unequivocally declared and confirmed that
I it was holding the 250,000 shares on trust the moment it acquired the said shares. The 500,000 shares were legally transferred to and registered in the name of the respondent on 11 April 2016.

[18] The learned High Court Judge made an error of applying the principle of law of an implied trust and in holding that "a party can only be said to be a beneficial owner if he has made full settlement of the purchase price" (see para. 76 of Her Ladyship's judgment). Her Ladyship found support for her finding by relying on the Federal Court decision in *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193.

[19] In *Tan Ong Ban*, the facts pertain to a sale and purchase of a property where the purchaser had paid in full the purchase price for the property to the vendor, but there was no effective transfer of legal ownership of the said property from the vendor to the purchaser. In this circumstance, the vendor became a bare trustee for the purchaser and the purchaser assumed the position of the beneficial owner. The creation of a trust in this circumstance is by implication, or more commonly known as implied trust, as opposed to the present case which involves a private express trust. The apex court imposed an implied trust to prevent injustice in the circumstances in which it was necessary for an inference to be drawn from the fact that the vendor could not unjustly enrich himself by not transferring the legal ownership of the property upon receipt of the full purchase price from the purchaser of the sale property. Contractually, the parties had intended the property to be transferred upon full settlement of the purchase price.

[20] In the instant case, although full ownership would be transferred to the appellant upon full settlement of the agreed acquisition costs, it was not the intention of the parties from the outset that the respondent was to sell the said shares to the appellant. Instead, it was agreed that the respondent would acquire the 500,000 shares and would hold 250,000 shares out of the 500,000 shares on behalf of and on trust for the appellant. Therefore, the assumption of beneficial ownership of the said shares was immediate and not upon condition that the appellant paid in full his part of the acquisition costs.

[21] This is a private express trust created by expressed intention and in writing, as opposed to an implied trust created by inference drawn from the facts between parties in an agreement, like a sale and purchase agreement. Therefore, the learned High Court Judge had erred in applying the legal principle of an implied trust enunciated in *Tan Ong Ban* to the present case.

The Entitlement To The Dividends

[22] In the course of the proceedings, this court posed a question to the parties "Whether could a trust be created over a deferred right? If yes. When would it take effect?" The "deferred right" is in reference to the legal ownership of the said shares. In so far as this issue is concerned, this court is of the considered view that in a situation of a private express trust, a settlor, upon having acquired the full legal ownership of a property, is entitled in law to make a declaration that he/she holds the said property on trust, and to name the beneficiary of his/her choice. If there is a condition

for the legal ownership to be transferred to the named beneficiary, that condition could not prevent or hinder the creation of a private express trust. That condition in the private express trust only goes to the effect of transfer of legal ownership.

[23] In the present case, it is not in dispute that the appellant has to pay his part of the shared acquisition costs to the respondent, and that was the condition set down in the trust in order for the trust property to be transferred to the appellant. As mentioned earlier, the learned High Court Judge applied the wrong principle of law on implied trust to a private express trust, which led the High Court Judge to the conclusion that there could be no trust until the appellant had paid up his share of the acquisition costs. For that reason, the learned High Court Judge had erred in conflating the condition set out in the trust deed for the transfer of the trust property with the law for the creation of an implied trust. They are entirely distinct creatures.

[24] Based on the above analysis, the first part of the question is answered in the affirmative. Then the next question is when the trust takes effect? The trust ought to have taken effect, in the opinion of this court, immediately upon the declaration being made by the respondent, which was on 11 April 2016, because the wording of the trust deed stated "the trustee hereby irrevocably declares and confirms that as from the date the trustee acquired the trust shares, it has been holding and shall continue to hold the trust shares".

[25] Further, in para. 4 of the trust deed, the appellant was entitled to nominate a representative to be appointed as a director to represent his interest in the company. Thus, the appellant's right(s) as a beneficiary to the said shares took effect immediately upon execution of the trust deed. Equally, the appellant was responsible to indemnify and keep the respondent fully indemnified against all damages, claims, costs and expenses in connection with the intended shareholders agreement to be executed by the respondent who would be representing the 500,000 shares of the company. Clearly, para. 4 had set out the appellant's right and liability toward his said shares upon the execution of the trust deed.

[26] Flowing from the above finding to the question posed by the court, the next pertinent consideration is whether the appellant was immediately entitled to the dividends to the said shares, which were declared by the company. In other words, did the respondent also hold on trust the dividends to the said shares for the benefit of the appellant? This court is of the considered view that the respondent not only agreed to hold the said shares on trust, but also agreed to hold the said shares and continue to hold the said shares "with all rights, title and benefits thereto as trustee, not for its own benefits, but upon trust for the sole and absolute benefit of the beneficiary."

[27] It is clear from the wording of the trust deed that the respondent would not take the rights, title and benefits to the said shares for its own entitlement or enjoyment, but would hold them on trust for the absolute benefit of the appellant. The rights, title and benefits surely must have included any dividend declared by the company. Therefore, it follows that the respondent not only held the said shares on trust for the appellant, but also held the declared dividends to the company's shares on trust for the benefit of the appellant the moment the private express trust took effect.

Dealings With The Dividends

[28] The trust deed was silent as to whether and how the respondent may deal with the dividends received from the company's 500,000 shares. As alluded to above, 50% of the dividends from the 500,000 shares belonged to the appellant and the respondent was merely holding the said dividends on trust for the appellant. There was no special or implied power given to the respondent as a trustee to deal with the said shares other than as provided for expressly in para. 3, which stated that the respondent shall cause the said shares to be transferred to the appellant and/or his nominee as and when requested to do so, provided that the appellant had paid in full all liabilities attributed to the said shares by the respondent.

[29] With regard to the dealing of the dividends, there was no instruction given to the respondent on how to deal with them. The only part in the trust deed that has some relevance to the dealing of the dividends is where it stated "all rights, title and benefits thereto as trustee, not for its own benefits, but upon trust for the sole and absolute benefit" of the appellant.

[30] Therefore, the respondent had the onus to ensure any dealing with the dividends has to be for the sole and absolute benefit of the appellant. Insofar as the first interim dividend received on 6 June 2016, the respondent had used it to offset part of the shared acquisition costs of the appellant's portion. Therefore, the dealing of the first interim dividend was indeed for the sole and absolute benefit of the appellant.

Whether There Was An Agreement To Offset The Acquisition Costs?

[31] The next question is whether there was an agreement to offset the acquisition costs with the dividends received? From the outset, the appellant averred that there was an understanding between the parties that the appellant would use his entitlement of the dividends to offset the sum which he owed for the acquisition costs. However, the respondent contended that there was no such agreement between the parties. This court finds this contention is no longer relevant for determination because this court finds that the appellant was entitled to the benefit of his shares including the dividends received. The dividends which the appellant was entitled to amounted to RM6,750,000. As such, the said RM6,750,000 could be used to offset the appellant's portion

of the shared acquisition costs because the purpose of offsetting the shared acquisition costs was for the absolute benefit of the appellant as a beneficiary of the said shares.

The Demand For Repayment Of The Acquisition Costs By The Respondent

[32] As discussed above, a private express trust had been created through the execution of the trust deed by the parties. The trust deed had also laid down the condition when the trust property, *ie*, the said shares, could be transferred to the appellant, the beneficiary. It also provided the trustee, the respondent, the right to demand for the repayment of the acquisition costs from the beneficiary. This is expressly provided in para. 2 of the trust deed which stated that the appellant "shall upon a request or demand being made" by the respondent, promptly and immediately contribute his portion of liabilities towards payment of the acquisition costs and financing obligations associated with the said shares.

[33] The respondent made its first demand on 15 May 2020 to the appellant for settlement of the balance of the acquisition costs. A second notice of demand was issued *via* the respondent's solicitors to the appellant on 27 August 2020. This court is of the considered view that the respondent was entitled under the terms of the trust deed to demand for repayment of the balance of the shared acquisition costs, but the repayment sum at that material time would depend on the parties' interests and rights. On 27 August 2020, the amount demanded was not the final balance outstanding sum for the shared acquisition costs because the loan was still subsisting and chargeable interests were still running until the full loan sum was finally paid off on 3 January 2022. It was until 3 January 2022, the respondent would be able to determine the actual final shared acquisition costs of the 500,000 shares.

[34] This court is of the considered view that the respondent was wearing two hats at the same time in the trust deed, one as a trustee, and the other as a creditor. Insofar as the obligation as a trustee was concerned, the respondent was responsible to ensure the dealings of the trust property and the rights, title and benefits thereto would go to the absolute benefit of the appellant. With regard to the position as a creditor, the respondent had the right to demand from the appellant for the repayment of the balance outstanding acquisition costs as envisaged in para. 2 of the trust deed.

[35] The right to demand for repayment was a right of the respondent as a creditor, not as a trustee. Upon a demand made for the repayment of the acquisition costs by the respondent (as a creditor) to the appellant (as a debtor), the repayment must necessarily be immediate. Therefore, the appellant could not postpone his obligation to pay the respondent by insisting using any future dividends to offset his immediate outstanding debt to the respondent. However, this issue has become academic because the

respondent's loan had been paid off on 3 January 2022 and the final shared acquisition costs could be determined. If there was a final sum due and payable, it had to be on 3 January 2022.

The Upshot Of The Above Findings

[36] This court has tabulated the remaining acquisition costs that the appellant is liable to pay the respondent as below:

Items	Amount
Costs of the 500,000 shares	RM18,750,000.00
Miscellaneous expenses incidental to the acquisition	RM7,075.47 RM101,125.20 RM567.55 RM81,500.00 RM20,000.00
Chargeable interest by the bank (from 21 April 2016 to 3.1.2022)	RM2,666,775.14
Total acquisition costs	RM21,627,043.36

The Total acquisition costs RM21,627,043.36 to be shared 50:50	RM10,813,521.68
Less initial payments made by the appellant	(RM500,000.00)
Less appellant's entitlement to half of the dividends received as at 22.6.2022 (total dividend received RM13,500,000.00)	(RM6,750,000.00)
Appellant owed (as at 22.6.2022) and is still owing the respondent	RM3,563,521.68

[37] The above tabulation is calculated until the full repayment of the principal sum and chargeable interest owing to the bank which ended on 3 January 2022 and also having considered the last dividend received on 22 June 2022.

[38] This court is of the considered view that after having considered the available dividends used to offset the remaining outstanding acquisition costs and the earlier payment made by the appellant, *ie*, the sum of RM500,000, the appellant owed (as at 22 June 2022) and is still owing the respondent the sum of RM3,563,521.68.

[39] The appellant averred that he only owed RM2,284,343.60 as the balance acquisition costs as at 28 February 2023 according to the tabulation in Appendix B of encl. 30 – hujahan bertulis perayu. The said sum of

A RM2,284,343.60 is derived from after having included chargeable interest of 5% amounting to the sum of RM1,279,178.08* which was purportedly owed to the appellant by the respondent (RM3,563,521.68 less RM1,279,178.08 = RM2,284,343.60).

B **[40]** This court could not agree with the appellant that the respondent could be liable for the chargeable interest of 5% calculated on the dividends declared (the portion of the appellant), because the declared dividends ought to have immediately offset whatever remaining outstanding balance of the acquisition costs at that material which the respondent was entitled to demand from the appellant. Therefore, the judgment to be entered against the C appellant for the sum owing to the respondent as the balance outstanding acquisition costs, which is to be paid by the appellant, is RM3,563,521.68.

(*Note: The court computed the interest allegedly chargeable in Appendix B to be in an amount of RM1,287,397.31, a difference of RM8,219.23. However, this is irrelevant as the chargeable interest is not allowed by this D court).

Summary Of This Court's Findings

[41] In summary, this court finds the learned High Court has erred in law in applying the principle of implied trust in the present case in circumstances E where the parties in the trust deed had in fact and in law created a private express trust. The requisite elements for creating an express trust, namely certainty of intention, certainty of subject matter and certainty of object were all found to be present in the said trust deed. Therefore, the trust took effect immediately upon the execution of the trust deed on 11 April 2016.

F **[42]** The respondent, being the trustee, not only held the trust property on trust for the benefit of the appellant, it also held the rights, title and benefits that derived from the trust property on trust. Therefore, the dividends derived from the trust property from time to time ought to be held on trust for the absolute benefit of the appellant.

G **[43]** Any dealing with the dividends must be to the benefit of the appellant. The dividends could be used to offset the acquisition costs of which the appellant had agreed to pay because such offsetting is for the absolute benefit of the appellant.

H **[44]** The respondent, other than being a trustee of the trust, was also a creditor to the appellant. The parties in the trust deed agreed that the respondent could demand that the appellant pay his portion of the liabilities towards payment of the acquisition costs and financing obligations associated with the trust property (the said shares). Therefore, the respondent was I entitled to do so at any time despite the finding of this court that the dividends could be used to offset the appellant's portion of the acquisition costs. There was no agreement that the repayment of the appellant's portion

of the acquisition costs could be deferred to as and when dividends were received from time to time. However, that right to demand has become academic as explained above.

[45] This court, after having examined the evidence of the trial court, finds the appellant indeed still owes the respondent the sum of RM3,563,521.68 as the appellant's portion of the final balance outstanding amount of the acquisition costs. Further, this court is of the considered view that the appellant could not impose on the respondent chargeable interest on the dividends received because the dividends received would have been used immediately to offset the appellant's shared acquisition costs at that material time.

Conclusion

[46] For the reasons as stated above, we hold that the learned judge of the High Court was plainly wrong in arriving at her decision and appellate intervention is warranted. As such, this court hereby makes the following orders:

(i) the appeal is allowed;

(ii) the High Court's order dated 28 October 2022 is hereby set aside. Consequently, the respondent's claim (the plaintiff's claim) is dismissed, and the appellant's counterclaim (the defendant's counterclaim) is allowed, and the orders are as follows:

(a) the appellant is to pay the respondent the sum of RM3,563,521.68 (as at 22 June 2022) as his portion of the contribution for the final outstanding balance sum of the acquisition costs for the 250,000 shares of the company Sekoplas Industries Sdn Bhd within one month from the date of this order;

(b) the appellant is liable to pay interest chargeable at 5% per annum on the said judgment sum to be calculated from the date 22 June 2022 until to the date of full settlement;

(c) the sum of RM12,485,514.32 (together with interest earned), which is currently held by the firm of solicitors Messrs Leong Yeng Kit & Co, (solicitors for the respondent) as stakeholder shall be released to the appellant after deduction is made for the payments in paras. (a) and (b) above within one month from the date of this order. The sums deducted in paras. (a) and (b) shall forthwith be released to the respondent by the said solicitors;

(iii) we order costs of RM50,000 (subject to allocatur) to be paid to the appellant as costs here and below.